No. 90-838

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHIRLEY M. MOLZOF, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT E. MOLZOF, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the meaning of the term "punitive damages" in the Federal Tort Claims Act, 28 U.S.C. 2674, is a question of federal law or state law.

2. Whether the prohibition in the Federal Tort Claims Act against the award of "punitive damages," 28 U.S.C. 2674, precludes the award of damages that are not compensatory.

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The opinion of the court of appeals (Pet. App. 1-9) is reported at 911 F.2d 18. The memorandum and order of the district court (Pet. App. 26-29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1990. The petition for a writ of certiorari was filed on November 27, 1990, and granted on March 18, 1991. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2674, are reproduced in the appendix to this brief, along with 38 U.S.C. 351 and 610, provisions relating to benefits available to veterans.

STATEMENT

1. Petitioner Shirley Molzof is the personal representative of the estate of Robert E. Molzof, her husband. Mr. Molzof was a veteran suffering from a service-connected disability and, accordingly, he was entitled to receive free medical care from the Veterans Administration (VA) pursuant to 38 U.S.C. 610. Pet. App. 3 n.2. On October 31, 1986, he underwent surgery for removal of the upper right lobe of his lung at the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin. Following the surgery, Mr. Molzof was temporarily placed on a ventilator. The ventilator's alarm system became disconnected and, while the alarm system was not functioning, the ventilator tube itself became disconnected, causing an interruption in his supply of oxygen. As a result, Mr. Molzof sustained irreversible neurological damage, leaving him permanently and totally comatose. *Id.* at 2. He continued to receive care at the VA Hospital in Tomah, Wisconsin. *Id.* at 26.

2. Mr. Molzof's guardian ad litem filed suit on his behalf under the Federal Tort Claims Act (FTCA) in the United States District Court for the Western District of Wisconsin. Mrs. Molzof also filed suit under the FTCA on her own behalf. The United States admitted liability and, after a trial on the issue of damages, the district court awarded Mr. and

Mrs. Molzof damages totaling $217,950. Mrs. Molzof was awarded $150,000 for past and future loss of consortium. Pet. App. 4, 28. Mr. Molzof was awarded $67,950 for future medical services to supplement the care provided by the VA hospital.[1] Specifically, the supplemental award was intended to provide: (1) physical therapy sessions; (2) respiratory therapy; and (3) weekly visits by a physician. Pet. App. 4, 27, 32. The district court declined to award requested damages for other future medical expenses. It determined that the free care being provided to Mr. Molzof by the VA was reasonable and adequate, that Mrs. Molzof was largely satisfied with that care and had no present intention to transfer Mr. Molzof to a private facility, and that, according to the record, neighboring private hospitals could not provide a comparable level of care. *Id.* at 3, 12-13, 27. The court noted that awarding a higher amount would result in double recovery from the government, and would be punitive. *Id.* at 27.[2] The court also declined to award Mr. Molzof damages for loss of enjoyment of life, reasoning that his condition precluded him even from being aware of such an award or benefiting from it and that such damages would therefore also be punitive in nature. *Id.* at 4, 28. After entry of the district court's final judgment, Mr. Molzof died; Mrs. Molzof, as personal representative of his estate, was substituted as plaintiff. Pet. App. 2 n.1.

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[1] The district court's memorandum and order awarded Mr. Molzof $67,950 for future medical expenses (Pet. App. 27, 29, 32); at a hearing, however, the district court had stated that it would award $75,750 (*id.* at 23), and the court of appeals mistakenly referred to that amount (*id.* at 4).

[2] The recovery of "punitive damages" is not permitted under the FTCA. 28 U.S.C. 2674.

3. The Seventh Circuit affirmed. Pet. App. 1-9. Noting the district court's findings regarding the lack of availability of comparable medical care at private medical facilities and the evidence that Mr. Molzof would not be transferred to a private facility, the court of appeals agreed with the district court that an award of additional damages for future medical expenses would result in double payment by the government for medical expenses. Pet. App. 5-6. Adopting the Fourth Circuit's approach in *Flannery* v. *United States*, 718 F.2d 108, 111 (1983), cert. denied, 467 U.S. 1226 (1984)—the approach followed by "the majority of circuits"—the court of appeals held that an award is "punitive" under the FTCA to the extent that it provides "more than the actual loss suffered by the claimant." Pet. App. 6. Accordingly, the court concluded that an additional award to Mr. Molzof for the expenses of future medical care would violate the FTCA's proscription against punitive damages. *Ibid.* The court emphasized that it was not formulating a broad rule limiting future medical expenses for any veteran entitled to free medical care (*ibid.*); rather, it was relying on the district court's factual determinations "that the Veterans facility provides the best level of care, that it is not in the plaintiff's best interest to be moved, that the plaintiff's wife is satisfied with the level of care, that she has no present intention to transfer the plaintiff, and that the plaintiff's short life span minimizes the likelihood of changed circumstances." *Id.* at 7.

With regard to damages for loss of enjoyment of life, the court of appeals pointed out that Wisconsin courts had not decided "whether a comatose plaintiff, with no conscious awareness of his *complete loss* of enjoyment of life, is entitled to recover damages for

that loss." Pet. App. 7. The court determined, however, that it was unnecessary to predict whether such damages would be recoverable under state law because those damages would, in any event, be barred as punitive under the FTCA. *Id.* at 8. Acknowledging that the Second Circuit had reached a different result in *Rufino* v. *United States*, 829 F.2d 354 (1987), the court agreed with the Fourth Circuit in *Flannery* v. *United States*, *supra*, that an award of damages to a comatose plaintiff for loss of enjoyment of life is necessarily punitive because the award cannot realistically be viewed as compensatory. Pet. App. 8-9. Concluding that "an award of damages for loss of enjoyment of life can in no way recompense, reimburse or otherwise redress a comatose patient's uncognizable loss," the court denied such an award "under the circumstances and findings in this case." *Id.* at 9.

SUMMARY OF ARGUMENT

1. The scope of the prohibition on "punitive damages" in the Federal Tort Claims Act, 28 U.S.C. 2674, is a question of federal law. The FTCA is a limited waiver of sovereign immunity, and the explicit limits on that waiver, such as the exclusion of punitive damages, are a subject of federal interpretation and definition. See, *e.g.*, *Richards* v. *United States*, 369 U.S. 1, 13-14 (1962). The interpretation of "punitive damages" in Section 2674 should not vary from State to State; consistent with congressional intent, the term must be given a uniform federal construction.

2. Punitive damages are damages that are in excess of, or bear no relation to, compensation. At the time of the enactment of the FTCA, the common law interpretation of punitive damages was that they

were damages exceeding, or unrelated to, compensation. The overriding purpose of the FTCA was to provide compensation to victims of torts by government employees, and interpreting punitive damages to mean damages in excess of compensation effectuates that congressional goal. The compensatory purpose of the Act—and the extra-compensatory nature of punitive damages—is also revealed by an amendment to Section 2674 that was added only one year after enactment of the FTCA itself.

Contrary to petitioner's contention, interpreting "punitive damages" in Section 2674 to mean damages in excess of compensation does not create unmanageable administrative difficulties. Although petitioner seeks to present a catalogue of insoluble problems that will purportedly result from such an interpretation, petitioner's examples reflect three basic questions, none of them extraordinarily difficult or complex—(1) excessiveness; (2) duplicativeness; and (3) non-compensability. Petitioner's parade of horribles fails to display issues of unusual difficulty, and fails to provide a justification for rejecting the interpretation of punitive damages that is most consonant with the purpose and scope of the FTCA.

3. With respect to both of the damages claims that petitioner pursues, the lower courts correctly determined that the requested damages would be punitive. With regard to the future medical expenses, the court of appeals' decision is narrowly limited; the court held only that an award of more than $1.3 million for future medical expenses, the amount petitioner seeks, would be punitive because the record in this case established that petitioner would continue to remain at the VA hospital regardless of such an award. Thus, the payment of more than $1.3 million would result

in double payment by the federal government and would serve no compensatory function. With regard to the damages for "loss of enjoyment of life," the lower courts properly determined that the award of such damages to a permanently and totally comatose plaintiff, who would remain unaware of his loss and who could never use or even realize the existence of such an award, would also serve no compensatory function.

ARGUMENT

I. CONGRESS INTENDED A UNIFORM FEDERAL STANDARD TO GOVERN WHETHER DAMAGES ARE "PUNITIVE" WITHIN THE MEANING OF 28 U.S.C. 2674

Petitioner mischaracterizes the FTCA as a statute under which the tort liability of the United States is determined, except in highly unusual circumstances, exclusively by reference to state law. Pet. Br. 7-8, 23-25. On the contrary, although the FTCA incorporates state law as the basic substantive standard for federal tort liability, the Act's numerous exclusions and limitations are all federally defined. Petitioner's interpretation of the exclusion for "punitive damages" in 28 U.S.C. 2674 as a variable standard that changes depending on the law of the State where the claim arises is, in fact, inconsistent with the overall scheme of the statute, which provides uniform federal limitations on Congress's waiver of sovereign immunity.

The starting point for any discussion of the scope of federal liability under the FTCA must be a recognition that the statute is a *limited* waiver of the government's sovereign immunity. *United States* v.

Orleans, 425 U.S. 807, 813 (1976).[3] In enacting the FTCA, Congress "did not assure injured persons damages for all injuries caused by [federal] employees." *Dalehite* v. *United States*, 346 U.S. 15, 17 (1953). Further, in construing the conditions on that waiver, the Court "should not take it upon [itself] to extend the waiver beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979).

The FTCA's basic substantive standard of liability is set forth in 28 U.S.C. 2674, which provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Along with 28 U.S.C. 1346(b), which grants the district courts jurisdiction over claims for property damage, personal injury, or death caused by the negligent or wrongful acts or omissions of federal employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," Section 2674 makes clear that the basic substantive standard for the federal government's liability for the torts of its employees is determined by reference to state law.

Section 2674 not only provides the affirmative statement of the basis for government liability, however; it also contains two significant limitations on the FTCA's waiver of sovereign immunity. The provision specifies that the United States "shall not be liable for interest prior to judgment *or for punitive damages*" (emphasis added). Nothing in the language of the statute links either of these limitations to state law. Moreover, as explicit limitations on the statute's basic waiver of sovereign immunity, these prohibitions should be construed in the same manner as the statute's other explicit conditions on that waiver, which this Court has consistently viewed as imposing uniform federal standards.

In *Richards* v. *United States*, 369 U.S. 1 (1962), this Court recognized that the FTCA contains numerous limitations on the waiver of sovereign immunity that are defined without relation to state law. The specific issue in *Richards* was whether Sections 1346(b) and 2674 require federal courts to apply only the internal law of the relevant State or, instead, to apply the State's whole law, including choice-of-law rules. Noting that nothing in the text of these provisions indicates Congress's intent on this issue (369 U.S. at 10), the Court concluded that the interpretation most consistent with the policies underlying the FTCA was that federal courts must apply the whole law of the State where an FTCA claim arises, including that State's choice-of-law rules. The Court nevertheless recognized that the FTCA contains numerous provisions under which government liability is not coextensive with that of a private person under state law. 369 U.S. at 13-14. The Court specifically noted Section 2674's prohibitions against punitive damages and pre-judgment interest, as well as the federal period of limitations for filing of claims (Section 2401(b)) and the exclu-

[3] Any waiver of sovereign immunity must be construed strictly in the government's favor, *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986), and may not be extended by implication, *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983).

sions for claims arising out of intentional torts (Section 2680(h)), claims arising in a foreign country (Section 2680(k)), and claims based on conduct within the scope of the discretionary function exception and other particular government activities (Section 2680). 369 U.S. at 13-14 n.28. The Court observed that, with respect to these provisions, Congress specifically "intended the federal courts *to depart completely from state law.*" *Id.* at 14 (emphasis added).

Similarly, in *United States* v. *Neustadt*, 366 U.S. 696 (1961), where it considered the scope of the FTCA's exclusion of claims arising out of misrepresentation (Section 2680(h)), the Court made clear that the scope of the exclusion was a matter of federal law. The question in *Neustadt* was whether the exclusion extended to claims arising out of negligent misrepresentation as well as those based on deliberate misrepresentation. Reviewing and rejecting the rationale for the court of appeals' conclusion that Section 2680(h) did not bar recovery for claims based on negligent misrepresentation, the Court noted:

> Whether or not this analysis accords with the law of States which have seen fit to allow recovery under analogous circumstances, it does not meet the question of whether this claim is outside the intended scope of the Federal Tort Claims Act, which depends solely upon what Congress meant by the language it used in § 2680(h).

366 U.S. at 705-706 (footnote omitted). The Court also noted that the FTCA required that the government's liability be determined in accordance with state law "*when a claim is not barred by one of the*

Act's exclusionary provisions," *id.* at 706 n.15 (emphasis added).[4]

Perhaps the most significant limitation on the waiver of sovereign immunity in the FTCA is the so-called discretionary function exception in Section 2680(a). This broad exclusion, described most recently by the Court in *United States* v. *Gaubert*, 111 S. Ct. 1267, 1274 (1991), as immunizing government conduct whenever "established government policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion," has always been interpreted as a uniform federal standard, without reference to state law. Indeed, the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). The lengthy development of the Court's jurisprudence concerning the scope of this important exception, from *Dalehite* v. *United States*, *supra*, to *Gaubert*, has proceeded totally independently of state law.

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[4] Petitioner notes that in *Neustadt* the Court relied, in part, on general principles of tort law in defining the scope of the misrepresentation exception in Section 2680(h). See Pet. Br. 15. The Court explicitly used those principles, however, only as an aid in determining the appropriate federal definition of misrepresentation. 366 U.S. at 705-706. The discussion in *Neustadt* does not support petitioner's suggestion that the meaning of "punitive damages" must be controlled by the law of the particular State where an FTCA claim arises. Moreover, as we explain in Part II below, petitioner's characterization of the common law does not provide an accurate guide to the meaning of "punitive damages" in Section 2674. See pp. 13-15, *infra*.

The rule of *Feres* v. *United States*, 340 U.S. 135 (1950), provides another instance where liability under the FTCA is not defined solely by standards of state law. As the discussion above demonstrates, petitioner errs (see Pet. Br. 24) in discounting *Feres* as an aberrational instance where the government's liability under the FTCA is not coextensive with that of a private individual under state law.

Petitioner also argues that the scope of the FTCA's prohibition against punitive damages must vary State by State to carry out congressional intent to make the United States liable to the same extent as a private individual in like circumstances under state law. Pet. Br. 8, 23-25. This argument ignores, however, this Court's consistent construction of the Act's limitation provisions as imposing uniform federal standards. Neither of the two cases cited by petitioner (Pet. Br. 24) as evidence of a reluctance by the Court to adopt federal standards under the statute concerns any of the Act's explicit limitations on federal liability. In *Richards* v. *United States*, *supra*, as we have already noted, the Court determined that a State's choice-of-law rules were simply part of the State's substantive law to be applied under Sections 1346(b) and 2674. The other case petitioner cites, *Williams* v. *United States*, 350 U.S. 857 (1955), is a two-sentence *per curiam* decision holding that whether a federal employee was "acting within the scope of his office or employment" (Section 1346(b)) was controlled by "the California doctrine of *respondeat superior*" even though the employee involved was an off-duty serviceman.[5] These cases clearly do not in-

[5] The court of appeals in *Williams* had held that although "scope of employment" issues under the FTCA are ordinarily decided by reference to state law, military personnel present a special situation in light of Section 2671, which provides that "acting within the scope of his office or employment" in the case of military personnel means "acting in line of duty." 215 F.2d 800, 807-808 (9th Cir. 1954).

volve, as this one does, explicit statutory limitations on the government's waiver of immunity which, as the Court noted in *Richards*, demonstrate Congress's intent "to depart completely from state law." 369 U.S. at 14.

A uniform federal interpretation of "punitive damages" under Section 2674 is the approach most consistent with this Court's interpretation of the statute's other specific limitations and, as we show below, with its overall purpose.

II. THE PROHIBITION AGAINST "PUNITIVE DAMAGES" BARS DAMAGES AWARDS THAT ARE NOT TRULY COMPENSATORY

A. The Purpose and Scope of the Federal Tort Claims Act Are Compensatory

Petitioner contends that the only reasonable interpretation of the prohibition against "punitive damages" in 28 U.S.C. 2674 is that Congress intended to bar the recovery of damages that are explicitly based on the tortfeasor's culpability or are intended to deter or punish, and therefore are considered punitive under applicable state law. Pet. Br. 7-27. Five courts of appeals, in contrast, have defined "punitive damages" in Section 2674 as those damages that are in excess of, or unrelated to, compensation.[6] As these

[6] See *D'Ambra* v. *United States*, 481 F.2d 14, 17 (1st Cir.), cert. denied, 414 U.S. 1075 (1973); *Flannery* v. *United States*, 718 F.2d 108, 111 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Hartz* v. *United States*, 415 F.2d 259, 264 (5th Cir. 1969); Pet. App. 1-9 (7th Cir. 1990); *Felder* v. *United States*, 543 F.2d 657, 669 (9th Cir. 1976). Other circuits have

courts have found, in light of the purpose and context of the FTCA, the term "punitive damages" refers to damages that are non-compensatory.

Petitioner maintains that a contrary interpretation of "punitive damages" is compelled by the common law understanding of the term and the plain language of Section 2674. Pet. Br. 8-18. Petitioner overlooks the critical fact, however, that "punitive damages" were traditionally considered punitive precisely because they were *in excess of compensation.*[7] As the First Circuit has explained, "[p]unitive damages * * * is that part of the award that is not compensatory; the terms are mutually exclusive." *D'Ambra* v. *United States*, 481 F.2d 14, 17, cert. denied, 414

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reached a contrary conclusion. See *Rufino* v. *United States*, 829 F.2d 354, 362 (2d Cir. 1987); *Kalavity* v. *United States*, 584 F.2d 809, 811 (6th Cir. 1978); *Manko* v. *United States*, 830 F.2d 831, 836 (8th Cir. 1987). See also *Reilly* v. *United States*, 863 F.2d 149, 164-165 (1st Cir. 1988); *Shaw* v. *United States*, 741 F.2d 1202, 1208 (9th Cir. 1984); *Yako* v. *United States*, 891 F.2d 738, 747 (9th Cir. 1989).

[7] See, *e.g.*, W. Prosser, *Handbook of the Law of Torts* § 2 at 12 (1st ed. 1941) (punitive damages "are given to the plaintiff over and above the full compensation for his injuries"); C. McCormick, *Handbook on the Law of Damages* § 77 at 275 (1935) ("The practice of awarding exemplary damages, known also as punitive damages and sometimes as 'smart money,' constitutes an exception to the rule that damages are aimed at compensation."); 1 T. Sedgwick, *A Treatise On The Measure Of Damages* § 357 at 703 (9th ed. 1912) ("[I]t is well settled that when [exemplary damages] are allowed it is in addition to compensatory damages for either physical or mental suffering."). See also *Milwaukee & St. Paul Ry.* v. *Arms*, 91 U.S. 489, 492 (1876) (exemplary damages allow a jury "to go farther" than "full compensatory damages"); *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (punitive damages are "add[ed] to the measured compensation of the plaintiff").

U.S. 1075 (1973). Indeed, the traditional understanding of a tort action was that its function was to *compensate* an individual for his injuries.[8] To be sure, as petitioner points out (Br. 9), the award of punitive damages was typically accompanied by an evaluation of the severity of the defendant's wrongdoing, but petitioner fails to understand that evidence of such wrongdoing was customarily the only *occasion* for awarding damages that were unrelated to—and exceeded—compensation. An essential, defining characteristic of punitive damages was that they were in excess of compensation. It is therefore entirely proper and consistent with this understanding to conclude that Congress, in enacting a statute to provide for compensation, intended for "punitive

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[8] See, *e.g.*, 1 J. Sutherland, *A Treatise on the Law of Damages* § 12 at 47 (4th ed. 1916) ("The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs."); 1 T. Sedgwick, *supra*, § 29 at 24 (1912) ("Damages consist in compensation for loss sustained."); W. Prosser, *supra*, § 2 at 10 ("The civil action for a tort * * * is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer."). See generally *Carey* v. *Piphus*, 435 U.S. 247, 254-255 (1978) (" 'The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.' ") (quoting 2 F. Harper & F. James, *Law of Torts* § 25.1 at 1299 (1956)); Comment, *Defining Punitive Damages Under The Federal Tort Claims Act*, 53 U. Cin. L. Rev. 251, 260 (1984) ("[T]o claim that compensatory damages can include more than the amount necessary to compensate the victim for his loss is internally inconsistent.").

damages" to refer to those damages that were not compensatory.[9]

The purpose of the FTCA strongly supports the conclusion that punitive damages are those damages that are not compensatory. As the Ninth Circuit recognized in *Felder* v. *United States*, 543 F.2d 657 (1976), "[s]ince the interpretation and application of the Act is a matter of federal law, we look to the purpose of the Act for a definition of punitive." *Id.* at 669 (footnote omitted). This Court has long recognized that the FTCA's purpose is compensatory: "The broad and just purpose which the statute was designed to effect was to *compensate* the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable." *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955) (emphasis added).

The legislative history of the statute, although unrevealing about the precise definition of "punitive damages" in Section 2674, confirms the compensatory goal of the statute. In its report on a predecessor of the bill that was eventually enacted, the House Committee on Claims recommended passage because "[y]our committee feels that it is the essence of jus-

[9] Petitioner repeatedly asserts that damages cannot possibly be "punitive" unless they are measured by the defendant's "culpability." *E.g.*, Pet. Br. 8, 9, 12, 15, 20, 25. Petitioner has it exactly wrong. If damages are unrelated to (or in excess of) compensation and are *not* accompanied by an inquiry into the gravity of the defendant's misconduct, that fact should provide *less* justification for their imposition, not more justification; in petitioner's view, in contrast, the absence of an inquiry into the severity of the defendant's misconduct somehow provides an automatic immunity for the damages as "compensatory" even if they serve no compensatory function.

tice and good administration that such injuries * * * should be promptly *recompensed*." H.R. Rep. No. 1112, 77th Cong., 1st Sess. 2 (1941) (emphasis added). Similarly, in hearings on another predecessor bill, a spokesman for the Attorney General testified that the purpose of such a bill was "to *redress* tortious wrongs arising out of Government activity," adding that "we think it is enough to satisfy the *actual claim*, rather than impose punitive damages on the United States." *Tort Claims: Hearings on H.R. 5375 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29, 30 (1942) (emphasis added).[10]

Because the goal of the FTCA is the compensation of persons injured by the tortious conduct of government employees, and because damages awards that exceed the level necessary to compensate injured persons for actual losses can have no other function than punishment, the court of appeals here correctly concluded that the prohibition against punitive damages in Section 2674 must be interpreted to bar awards that do not compensate actual losses.

This interpretation is also the most consistent with the language Congress used when it amended the FTCA in 1947 (the year after its enactment), adding the second paragraph of section 2674. This paragraph addressed the problem created by the fact that,

[10] Because the FTCA was the product of consideration in several Congresses, the legislative history of predecessor bills may be instructive in interpreting the statute as enacted in 1946. See, *e.g.*, *Dalehite*, 346 U.S. at 26-30. See also *United States* v. *Spelar*, 338 U.S. 217, 220 n.9 (1949) ("The shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress."); 1 L. Jayson, *Handling Federal Tort Claims* § 59.01 at 2-55 (1991).

in 1947, two States, Alabama and Massachusetts, awarded only punitive damages for wrongful deaths.[11] See *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. 128 (1956). Because of the prohibition against punitive damages in Section 2674, the United States maintained that it was not liable for damages to the survivors of persons who died as a result of government negligence in those States. To remedy this situation, Congress amended the statute to provide that where, in wrongful death cases, applicable state law "provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for *actual or compensatory* damages, measured by the pecuniary injuries resulting from such death * * *." 28 U.S.C. 2674 (emphasis added).

This second paragraph, added just one year after enactment of the FTCA, should be read *in pari materia* with Section 2674's prohibition against punitive damages. *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972).[12] The amendment confirms the compensatory purpose of the statute and demonstrates that Congress intended to define "punitive

[11] Massachusetts revised its statute, effective in 1974, to provide for compensatory damages in wrongful death cases. Mass. Ann. Laws ch. 229, § 2 (Law. Co-op. 1986). See S. Speiser, *Recovery for Wrongful Death* § 3.3 (2d ed. 1975).

[12] In *Erlenbaugh*, the Court specifically noted that "a 'later act can . . . be regarded as a legislative interpretation of [an] earlier act . . . in the sense that it aids in ascertaining the meaning of words as used in their contemporary setting,' and 'is therefore entitled to great weight in resolving any ambiguities and doubts' " 409 U.S. at 243-244 (quoting *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940)).

damages" by contrasting them with "actual or compensatory damages." [13]

Contrary to petitioner's suggestion (Br. 16-18), *Massachusetts Bonding & Ins. Co.* v. *United States*, *supra*, is fully consistent with the government's interpretation of Section 2674. In *Massachusetts Bonding*, the Court considered whether a Massachusetts statute which set a monetary ceiling on punitive dam-

[13] In the second paragraph of Section 2674, Congress provided a specific measure for "actual or compensatory damages" in wrongful death cases (*i.e.*, "the pecuniary injuries resulting from such death") in the two States where the amendment applied. We do not contend that compensatory damages in other kinds of tort suits against the United States in those same States, or in any FTCA actions in other States, are limited by this provision to pecuniary losses. Indeed, the government regularly pays awards of non-pecuniary but nevertheless compensatory damages (such as damages for pain and suffering, loss of consortium, or infliction of emotional distress). By providing a specific measure of damages in the second paragraph of Section 2674, Congress simply filled a "vacuum" of standards for compensation of wrongful death claims in States which permit only punitive damages for that cause of action. In this "vacuum," Congress itself provided a measure for compensatory damages, albeit a stricter one than many States have chosen.

In our view, the only limitation on non-pecuniary awards imposed by Section 2674's prohibition against punitive damages is that such awards may not exceed the claimant's actual loss. The court of appeals here did not conclude otherwise. Although petitioner asserts that the court of appeals "held" that punitive damages under the FTCA are any that exceed the claimant's *pecuniary* loss (Pet. Br. 22), the portion of the Seventh Circuit's opinion quoted by petitioner (Pet. App. 6) purports only to describe the decisions of other courts (as described in a law review commentary). In any event, the court was discussing petitioner's request for future medical expenses, a pecuniary loss; in that context, a damages award in excess of the expected pecuniary loss would not be compensatory, but punitive.

ages in wrongful death cases applied to limit the government's liability for "actual or compensatory" damages in such cases under the second paragraph of Section 2674. The Court held that the limit set by the Massachusetts statute did not address the kind of damages, *i.e.*, compensatory damages, authorized by Section 2674 and that, accordingly, the state statutory limit did not apply to damages under the FTCA. In explaining why the state penal statute had no bearing on recovery in an FTCA suit, the Court observed that "[b]y definition, punitive damages are based upon the degree of the defendant's culpability." 352 U.S. at 133. That statement is by no means inconsistent with the view that damages exceeding the level necessary to make the claimant whole can have no other function than to punish the defendant and thus are punitive in their effect. Indeed, as with the common law understanding of "punitive damages" discussed above, petitioner ignores the fact that the Court also explained that the damages were "punitive" because they were "not compensatory," *id.* at 132; the Court's decision does not support a conclusion that damages may be unrelated to compensation and yet not be punitive.

Determining whether damages are punitive by reference to whether they compensate an actual loss is hardly a novel approach. The concept of liquidated damages in contract law has long incorporated a prohibition against penalties disguised as compensation. Liquidated damages are traditionally defined as a sum which a party to a contract agrees to pay in the event of a breach and which has been "arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach." C. McCormick, *Handbook of the Law of Damages* § 146 at 599 (1935). In contrast, a penalty is a sum

that a party agrees to pay as punishment in the event of a breach. *Id.* at 600. Even if a contract specifies an amount to be paid as "liquidated damages," courts will declare that provision to be an unenforceable penalty if the amount specified is so disproportionate to the foreseeable monetary consequences of a breach that it cannot be viewed as a genuine pre-estimate. *Id.* § 149 at 607. This Court has applied this rule in contract cases. See, *e.g.*, *Kothe* v. *R.C. Taylor Trust*, 280 U.S. 224, 226 (1930); *Wise* v. *United States*, 249 U.S. 361, 365 (1919). Thus, in a different context, this Court has adopted an approach very similar to the one we urge here.

In sum, the purpose and scope of the Federal Tort Claims Act are compensatory; by expressly excluding "punitive damages," Congress limited damage awards under the FTCA to amounts that compensate the plaintiff.

B. Defining "Punitive Damages" As Damages That Are Not Compensatory Does Not Create Unmanageable Administrative Difficulties

Petitioner argues that it is unworkable to define "punitive damages" in Section 2674 as those damages that exceed the level necessary to compensate the claimant for actual losses because application of that definition would require federal courts to make a welter of unusually difficult and burdensome factual determinations. In support of this contention, petitioner provides a long list of cases (Br. 28-30), described as presenting "only a few examples of the types of questions which would arise" (*id.* at 30) if the Court were to adopt this definition. Despite their factual diversity, however, these cases present only three basic questions, none of them substantially dif-

ferent from or more difficult than determinations routinely made by judges and juries in non-FTCA tort cases. The questions are: (1) whether the damages are *excessive* because particular elements exceed the actual losses caused by the tortious conduct, (2) whether the separate elements of damages awarded are *duplicative* of one another or of other government benefits, and (3) whether the damages are awarded for an *inherently non-compensable loss.*

The first of these issues ("excessiveness") is not raised in this case and need not be directly addressed here. We note simply that state law standards for review of damages awards, which typically call for comparison of awards for specific elements of damages to previous awards in similar factual circumstances (see, *e.g.*, *Shaw* v. *United States*, 741 F.2d 1202, 1209-1210 (9th Cir. 1984)), will generally provide appropriate compensatory standards under the FTCA. At some hypothetical extreme, state law could permit damages awards to become so disproportionate to any realistic appraisal of actual loss that they would be considered punitive under Section 2674. Cf. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991) (holding that the common-law method for assessing punitive damages is not *per se* unconstitutional but leaving open the possibility that a particular award could be so excessive as to violate due process). In general, however, state law standards of excessiveness will be sufficient to implement Section 2674's prohibition against punitive damages.

The second of the issues raised by the cases in petitioner's list is whether elements of damages awarded are duplicative of one another or of other government benefits. Concern about duplicative damages under the FTCA is not new to this Court. Less than four years after the statute's enactment, in an FTCA

case concerning wrongful death and injury of military service personnel, the Court observed:

> [W]e now see no indication that Congress meant the United States to pay twice for the same injury. Certain elements of tort damages may be the equivalent of elements taken into account in providing disability payments. It would seem incongruous, at first glance, if the United States should have to pay in tort for hospital expenses it had already paid, for example.

Brooks v. *United States*, 337 U.S. 49, 53-54 (1949). In *Brooks*, the Court upheld the right of servicemen to recover under the FTCA for government negligence unrelated to their military service. The Court remanded the case, however, for consideration of whether, in light of the record, damages should have been reduced by amounts payable "under servicemen's benefit laws." 337 U.S. at 53-54.[14] As in *Brooks*, and contrary to petitioner's suggestion, a concern about imposing duplicative damages on the government is consistent with the compensatory purpose of the Act, and clearly does not pose any insuperable administrative burden.

As petitioner's list reflects, the dual payment issue includes cases concerning deduction of federal income taxes from awards for lost future earnings. The courts of appeals have almost uniformly concluded that the failure to make such a deduction in an FTCA case would violate the prohibition against punitive damages—even if state law does not require such a deduction—because it would provide the claimant with more disposable income than he would

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[14] The Court did not squarely decide the issue, in part because the deductibility of service benefits had not been argued in this Court, nor addressed in the court of appeals. 337 U.S. at 53-54.

have had in the absence of the injury giving rise to the litigation, and because the government, as tax collector and defendant, would be penalized unfairly. See, *e.g.*, *Felder* v. *United States*, 543 F.2d at 669-670; *Flannery* v. *United States*, 718 F.2d at 111-112; *Shaw* v. *United States*, 741 F.2d at 1206-1207; *Hartz* v. *United States*, 415 F.2d 259, 264-265 (5th Cir. 1969); *Harden* v. *United States*, 688 F.2d 1025, 1029-1030 & n.1 (5th Cir. 1982); *O'Connor* v. *United States*, 269 F.2d 578, 584 (2d Cir. 1959). See also *Kalavity* v. *United States*, 584 F.2d 809, 813 (6th Cir. 1978) (income taxes need not be deducted in cases where estimated income is at the "lower or middle reach of the income scale"). But see *Manko* v. *United States*, 830 F.2d 831, 836 (8th Cir. 1987) (declining to deduct federal income taxes). The Ninth Circuit has explained the punitive nature of failing to deduct federal taxes from awards of lost future earnings. If future federal taxes were not deducted from such an award, the government would effectively pay twice—once by losing the tax revenues it would have received from the claimant in the absence of his injury, and again by paying out an equivalent amount as part of the tort judgment. *Felder*, 543 F.2d at 670 n.17. As with the issue of duplicative payments generally, consideration of the deductibility of future federal taxes is both a proper application of the Act and an undertaking well within the competence of federal courts.

The concern with dual payments is that the government—the tortfeasor—should not be required to pay *more* than the amount of the injury that the government caused. Notably, this concern is not implicated by the so-called "collateral source doctrine" under which many States permit full recovery from the tortfeasor even though the injured party is also

compensated for some or all of the same damages by an entirely independent source. See, *e.g.*, *Reilly* v. *United States*, 863 F.2d 149, 165 n.13 (1st Cir. 1988). The rationale of that doctrine is that the tortfeasor should not receive a windfall as a result of his victim's planned or fortuitous eligibility for some other source of compensation. *Ibid.* We do not argue that tort judgments against the United States should be reduced by the amount of benefits received by FTCA claimants from truly *collateral* sources.[15] The question whether one element of damages duplicates another, and therefore exceeds the amount necessary to compensate the claimant's injury, is directed not at whether the government should be permitted to avoid payment altogether because another source of payment exists, but rather at whether the government may be forced to pay *twice* for the same injury. A dual payment situation is punitive because the government is paying for *more* than the injuries caused by its tort; in contrast, application of the collateral

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[15] Private insurance benefits received by an FTCA claimant would fall within this category of collateral sources. See, *e.g.*, *Smith* v. *United States*, 587 F.2d 1013, 1017 (3d Cir. 1978). Some courts of appeals have held that government benefits such as Medicare and Social Security, which are not paid out of the general Treasury but rather out of separate insurance funds to which the claimant has contributed, are collateral sources. See *e.g.*, *Siverson* v. *United States*, 710 F.2d 557, 560 (9th Cir. 1983); *Smith* v. *United States*, 587 F.2d at 1016. Accordingly, damages awards under the FTCA are not reduced by these benefits even if they cover the same medical care or other costs compensated by the tort judgment against the United States. See also *Overton* v. *United States*, 619 F.2d 1299, 1308 (8th Cir. 1980) (Medicare payment, from a fund to which the claimant did not contribute, was not from a collateral source, and thus should be deducted from the damages award).

source doctrine is not punitive because the tortfeasor only pays once for the injury it caused. And, again, whether the elements of damages awarded in an FTCA case are duplicative of one another or of other government benefits is a factual issue no more complex or difficult than other factual questions that trial courts routinely confront in determining the appropriate level of compensatory damages in tort cases.

The third of the questions raised in petitioner's list of cases is whether damages are awarded for an inherently non-compensable loss. Although the fact situation in this case, involving a claim for damages for loss of enjoyment of life by a comatose plaintiff, does indeed present the issue, whether an injury is inherently non-compensable will not arise frequently. Despite the fact that cases presenting the issue are unusual, however, they do not demand determinations radically different from those required by the application of other, well-recognized tort doctrines. Perhaps the closest analogy is to claims by survivors for the pain and suffering of deceased family members under state survival statutes. Such statutes typically permit recovery by the decedent's personal representatives for damages that the *decedent* could have recovered had he lived. See S. Speiser, *Recovery for Wrongful Death* § 14:1 at 410 (2d ed. 1975).[16] In actions under state survival statutes in which damages for pain and suffering of the decedent are recoverable, there must be evidence of *conscious* pain and suffering by the decedent. *Id.* § 14.10 at 435-436. A rule re-

[16] Such survival statutes are different from wrongful death statutes, which provide survivors (or the decedent's estate) with a remedy for losses *they* have sustained as a result of the decedent's death. See S. Speiser, *supra*, § 14:1 at 410.

quiring some degree of consciousness by the claimant in an FTCA case as a predicate to recovery for loss of enjoyment of life is no more unusual or difficult to apply than the similar requirement of consciousness routinely imposed as a limitation on pain-and-suffering damages in actions under state survival statutes.[17] Its application might require a bright line demarcation between totally comatose claimants and all others, [18] but such a rule is by no means impracticable, as petitioner suggests.

Thus, in addition to being consistent with the compensatory purpose of the FTCA, interpreting the prohibition against punitive damages in 28 U.S.C. 2674 to preclude damages awards that exceed the level necessary to compensate the claimant for his actual losses—and therefore barring recovery of damages for future nonpecuniary loss by unconscious claim-

[17] Indeed, although most States permit consideration of loss of enjoyment of life in determining the tort damages of non-comatose victims, the majority of States treat it not as a separate element of damages but rather as part of a general award for pain and suffering. Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 Pac. L.J. 965, 967 (1981). See, *e.g.*, *McDougald* v. *Garber*, 73 N.Y.2d 246, 255-257, 536 N.E. 2d 372, 375-376, 538 N.Y.S.2d 937, 940-942 (1989); *Huff* v. *Tracy*, 57 Cal. App. 3d 939, 129 Cal. Rptr. 551 (1976).

[18] See, *e.g.*, *McDougald* v. *Garber*, *supra*. In *McDougald*, the New York Court of Appeals ruled that a comatose plaintiff could not recover damages for loss of enjoyment of life under New York law. The court held that the plaintiff must retain "some level of awareness" to recover for any aspect of nonpecuniary loss. It concluded that this bright line rule would mean that fact finders were not required "to sort out varying degrees of cognition and determine at what level a particular deprivation can be fully appreciated." 73 N.Y. 2d at 940, 536 N.E.2d at 374, 538 N.Y.S. 2d at 255.

ants, as well as awards for elements of damages duplicative of one another or of other governmental benefits—provides a workable rule for the federal courts to apply.

III. THE COURT OF APPEALS CORRECTLY DENIED DAMAGES FOR FUTURE MEDICAL EXPENSES AND FOR LOSS OF ENJOYMENT OF LIFE ON THE GROUND THAT SUCH DAMAGES WERE "PUNITIVE" WITHIN THE MEANING OF 28 U.S.C. 2674

A. Additional Damages For Future Medical Expenses Would Duplicate Other Government Payments And Serve No Compensatory Function

The court of appeals concluded that damages for future medical expenses beyond those necessary to supplement the care Mr. Molzof was receiving in the VA hospital would result in double payment by the federal government and would accordingly be punitive. Pet. App. 5-7. That conclusion was based on the particular facts of this case and establishes no broad rule concerning the availability under the FTCA of damages for future medical expenses to veterans eligible for free medical care from the VA.

Petitioner's position, in contrast, is that Mr. Molzof was entitled to more than $1.3 million for future medical care even though the record in this case established that the money would not be used for future medical expenses, even though the government was already paying for petitioner's future medical expenses, and even though Mr. Molzof received an additional $67,950 to supplement his future medical care. Pet. Br. 36-45. An award of more than $1.3 million in such circumstances could only be characterized as punitive; on this record, it clearly would not be compensatory.

The court of appeals determined, on the basis of factual findings by the district court, that the VA hospital where Mr. Molzof was receiving care provided the best level of care available; that it was not in his best interest to be moved; that Mrs. Molzof was satisfied with the level of care that he was receiving and had no present intention to transfer him to a private facility; and that Mr. Molzof's short life expectancy minimized the likelihood that these circumstances would change. Pet. App. 7. The court of appeals accordingly agreed with the district court that an award for future medical expenses (beyond the supplemental award of $67,950) would result in double payment with a punitive effect. *Id.* at 6-7.

In reaching that conclusion, the court of appeals took pains to explain that it was not disagreeing with the decisions in *Ulrich* v. *Veterans Admin. Hosp.*, 853 F.2d 1078 (2d Cir. 1988), and *Feeley* v. *United States*, 337 F.2d 924 (3d Cir. 1964). In those cases, the courts held that an FTCA plaintiff eligible for free VA medical care was entitled to an award for future medical expenses to permit him to choose whether he wished to continue to obtain such care from the VA. The court of appeals here stated that it agreed with *Ulrich* and *Feeley* that the availability of free medical care to a veteran does not automatically limit an FTCA award for future medical expenses. Pet. App. 6-7. The court stressed, however, that the record in this case established no likelihood that Mr. Molzof would transfer to a private facility, and thus no reason to believe that an award for future medical expenses (beyond that awarded to supplement the care at the VA hospital) would actually be used for such expenses. *Id.* at 7. The court thus agreed with the general principle in *Ulrich* and *Feeley* and carefully distinguished the facts of this case.

Petitioner complains that the court of appeals' decision gives the United States "preferential treatment" because a private hospital in Wisconsin cannot escape tort liability to a patient injured as a result of the hospital's negligence "merely by promising to render future care to the patient." Br. 39-40. At the outset, petitioner's statement (which includes no citations to Wisconsin cases or statutes) is a non sequitur for two reasons. First, this case does not involve a mere "promis[e]" of future care; it concerns the federal government's actual provision of the care. Second, and more fundamentally, petitioner's analogy ignores the district court's factual finding, which specifies that, so far as appears from the record, no other hospital in the area could provide comparable care. Pet. App. 27.

Even if petitioner's statement of Wisconsin law were correct and apropos, however, the fact that the FTCA does not always place the government in precisely the same position as a private tortfeasor has been acknowledged by this Court. See, *e.g.*, *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. at 133-134 (holding that by adopting a specific measure of compensatory damages in the second paragraph of 28 U.S.C. 2674, Congress "deliberately chose" to permit "substantial differences in recovery to exist" between wrongful death suits against the government and such suits against private defendants in States covered by that provision). The prohibition against punitive damages in Section 2674 is, by its very nature, a limitation on federal liability that does not apply in suits against private individuals under state law.

Petitioner also claims (Br. 41-43) that if Congress had intended to prohibit double payment in these circumstances, it would have included an explicit provision to that effect, as in 38 U.S.C. 351. But 38 U.S.C. 351 concerns the payment of VA disability benefits: it provides for a set-off, against future VA disability benefits, of any judgment or settlement of an FTCA claim arising from injuries suffered or aggravated as a result of hospitalization, medical or surgical treatment, or vocational rehabilitation provided by the VA. Section 351 thus exclusively addresses circumstances in which, by definition, VA benefits and FTCA malpractice damages overlap.

In contrast, 38 U.S.C. 610 (under which Mr. Molzof was eligible for free medical care) concerns the general eligibility of veterans for hospitalization and nursing care. Section 610 thus has a far broader scope than Section 351 and applies in many circumstances in which the issue of double recovery is not pertinent. That Congress did not explicitly provide for a set-off of FTCA damages against the medical benefits provided under 38 U.S.C. 610 thus does not establish that Congress intended to provide double recovery from the government for tort plaintiffs who will receive such medical benefits.

The court of appeals' refusal to award damages for future medical expenses (other than those necessary to supplement the care being provided by the VA hospital) was not based on a speculative possibility. Rather that decision was based on a careful reading of the record supporting the district court's factual finding that any other result was extremely unlikely. The court's essentially factual determination was no different from many other predictive judgments courts make in determining the appropriate level of damages to compensate tort plaintiffs for actual losses, *e.g.*, the plaintiff's life expectancy, his future earning capacity, or his future medical needs. Having concluded that an award of additional

damages to Mr. Molzof for future medical expenses would result in double payment by the government for the same losses, the court properly determined that such damages would be punitive within the meaning of 28 U.S.C. 2674. Petitioner's position—that Mr. Molzof was entitled to more than $1.3 million for future medical expenses even though the record established that the money would not be used for that purpose and even though the federal government would be separately paying for all of his future medical expenses—cannot be reconciled with the compensatory purpose of the Federal Tort Claims Act.[19]

B. Damages For Loss Of Enjoyment Of Life To A Comatose Claimant Are Necessarily Punitive In Their Effect

Petitioner also challenges the court of appeals' rejection of the request for damages based on loss of enjoyment of life. However, the court of appeals correctly determined that providing such an award—which the district court found would be no more than $60,000, if permitted (Pet. App. 28)—to a permanently and totally comatose plaintiff, such as Mr. Molzof, would be punitive, rather than compensatory.

Damages for the loss of enjoyment of life are intended to compensate a plaintiff for the deprivation of life's pleasures. They are intended to provide a plaintiff with solace for what he has lost. See generally Comment, *Loss of Enjoyment of Life as a*

[19] Petitioner suggests (Br. 43-45) that the district court's order providing for the supplementation of medical care would have been unenforceable, but we are confident that the parties could have reached a resolution faithfully implementing the district court's order. In any event, the issue was rendered hypothetical by Mr. Molzof's death.

Separate Element of Damages, 12 Pac. L.J. at 972-973. A permanently and totally comatose plaintiff, however, has no awareness or cognition of his loss. Accordingly, an award of damages for loss of enjoyment of life can serve no compensatory purpose. As the Fourth Circuit has explained:

> [The plaintiff] is conscious of nothing and incapable of enjoying anything. * * * There is no likelihood whatever that he will ever become aware of anything.
>
> * * * It is perfectly clear * * * that an award of $1,300,000 for the loss of enjoyment of life cannot provide him with any consolation or ease any burden resting upon him. * * * He cannot use the $1,300,000. He cannot spend it upon necessities or pleasures. He cannot experience the pleasure of giving it away.

Flannery, 718 F.2d at 111.[20]

Petitioner does not explain how such an award is conceivably compensatory. Instead, petitioner relies on the general proposition, previously explored, that the damages cannot be considered punitive because they are not so characterized by state law and because they are not measured by the defendant's culpability. Pet. Br. 49.[21] The problems with petitioner's

[20] See also *McDougald* v. *Garber*, 73 N.Y.2d at 254, 536 N.E.2d at 375, 538 N.Y.S.2d at 940 ("The question posed by this case * * * is whether an award of damages for loss of enjoyment of life to a person whose injuries preclude any awareness of the loss serves a compensatory purpose. We conclude that it does not. Simply put, an award of money damages in such circumstances has no meaning or utility to the injured person.").

[21] With regard to state law, the court of appeals observed (Pet. App. 7), and petitioner concedes (Pet. Br. 47), that Wisconsin appellate courts have not addressed the question

approach have been discussed, but petitioner's reliance on that general proposition cannot mask the conspicuous absence of any explanation as to how an award of damages for loss of enjoyment of life may be considered compensatory when made to a permanently and totally comatose plaintiff.

Indeed, petitioner's position with respect to these damages exposes the central flaw in petitioner's argument. The burden of petitioner's position is that no damages may be excluded as "punitive damages" under the explicit command of Section 2674, even if they are wildly in excess of an amount that would compensate the plaintiff or bear no relation to compensation, so long as they are not characterized as "punitive" by state law (and, apparently, measured by the defendant's culpability). Such a position conflicts with the fundamental purpose of the FTCA—

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whether state law permits recovery of damages for loss of enjoyment of life by a comatose tort plaintiff. Petitioner nevertheless asserts that "under Wisconsin law, a comatose plaintiff has a right to recover for such loss." Pet. Br. 47. Although the issue need not be decided, we note that we disagree with petitioner's reading of Wisconsin law. Wisconsin has long recognized loss of enjoyment of life as a separate element of tort damages. See *Benson* v. *Superior Mfg. Co.*, 147 Wis. 20, 132 N.W. 633 (1911); *Bassett* v. *Milwaukee N. Ry.*, 169 Wis. 152, 170 N.W. 944 (1919). Neither *Benson* nor *Bassett*, however, casts any light on whether conscious awareness by the plaintiff is a necessary component of proof of that element of damages. But Wisconsin does not permit a plaintiff in a survival action to recover damages for the decedent's loss of enjoyment of life, specifically because such an award would violate the basic principle that tort damages are compensatory. See *Prunty* v. *Schwantes*, 40 Wis. 2d 418, 424, 162 N.W.2d 34, 38 (1968). By similar reasoning, it is also punitive rather than compensatory to award damages for loss of enjoyment of life to a permanently comatose plaintiff.

compensation—and with its carefully sculpted limitations to serve that purpose. Under a correct interpretation of the FTCA, Section 2674 excludes those damages that are not compensatory. Because the award of damages for loss of enjoyment of life to a permanently and totally comatose plaintiff, like the recovery of double payment from the government for future medical expenses, is not compensatory, it is punitive and thus barred by the terms of Section 2674.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Federal Tort Claims Act, 28 U.S.C. 1346 and 2674, provides in pertinent part:

§ 1346. United States as defendant

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or

omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

2. Sections 351 and 610, 38 U.S.C., provide:

§ 351. Benefits for persons disabled by treatment or vocational rehabilitation

Where any veteran shall have suffered an injury, or aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Vet-

erans' Administration, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

§ 610. Eligibility for hospital, nursing home, and domiciliary care

(a)(1) The Administrator shall furnish hospital care, and may furnish nursing home care, which the Administrator determines is needed—

(A) to any veteran for a service-connected disability;

(B) to a veteran whose discharge or release from the active military, naval, or air service was for a disability incurred or aggravated in line of duty, for any disability;

(C) to a veteran who is in receipt of, or who, but for a suspension pursuant to section 351 of this title (or both such a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such veteran's continuing eligibility for such care is provided for in the judgment or settlement described in such section, for any disability;

(D) to a veteran who has a service-connected disability rated at 50 percent or more, for any disability;

(E) to any other veteran who has a service-connected disability, for any disability;

(F) to a veteran who is a former prisoner of war, for any disability;

(G) to a veteran exposed to a toxic substance or radiation, as provided in subsection (e) of this section;

(H) to a veteran of the Spanish-American War, the Mexican border period, or World War I, for any disability; and

(I) to a veteran for a non-service-connected disability, if the veteran is unable to defray the expenses of necessary care as determined under section 622(a)(1) of this title.

(2)(A) To the extent that resources and facilities are available, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to a veteran for a non-service-connected disability if the veteran has an income level described in section 622(a)(2) of this title.

(B) In the case of a veteran who is not described in paragraph (1) of this subsection or in subparagraph (A) of this paragraph, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to the veteran for a non-service-connected disability—

(i) to the extent that resources and facilities are otherwise available; and

(ii) subject to the provisions of subsection (f) of this section.

(3) In addition to furnishing hospital care and nursing home care described in paragraphs (1) and (2) of this subsection through Veterans' Administration facilities, the Administrator may furnish such hospital care in accordance with section 603 of this title and may furnish such nursing home care as authorized under section 620 of this title.

(b)(1) The Administrator may furnish to a veteran described in paragraph (2) of this subsection such domiciliary care as the Administrator determines is needed for the purpose of the furnishing of medical services to the veteran.

(2) This subsection applies in the case of the following veterans:

(A) Any veteran whose annual income (as determined under section 503 of this title) does not exceed the maximum annual rate of pension that would be applicable to the veteran if the veteran were eligible for pension under section 521(d) of this title.

(B) Any veteran who the Administrator determines has no adequate means of support.

(c) While any veteran is receiving hospital care or nursing home care in any Veterans' Administration facility, the Administrator may, within the limits of Veterans' Administration facilities, furnish medical services to correct or treat any non-service-connected disability of such veteran, in addition to treatment incident to the disability for which such veteran is hospitalized, if the veteran is willing, and the Administrator finds such services to be reasonably necessary to protect the health of such veteran. The Administrator may furnish dental services and treatment, and related dental appliances, under this subsection for a non-service-connected dental condition or disability of a veteran only (1) to the extent that the Administrator determines that the dental facilities of the Veterans' Administration to be used to furnish such services, treatment, or appliances are not needed to furnish services, treatment, or appliances for dental conditions or disabilities described in section 612(b) of this title, or (2) if (A) such non-service-connected dental condition or disability is associated with or aggravating a disability for which such veteran is receiving hospital care, or (B) a compelling medical reason or a dental emergency requires furnishing dental services, treatment, or appliances (excluding the furnishing of such services, treatment, or appliances of a routine nature) to such veteran during the period of hospitalization under this section.

(d) In no case may nursing home care be furnished in a hospital not under the direct jurisdiction of the Administrator except as provided in section 620 of this title.

(e)(1)(A) Subject to paragraphs (2) and (3) of this subsection, a veteran—

(i) who served on active duty in the Republic of Vietnam during the Vietnam era, and

(ii) who the Administrator finds may have been exposed during such service to dioxin or was exposed during such service to a toxic substance found in a herbicide or defoliant used in connection with military purposes during such era,

is eligible for hospital care and nursing home care under subsection (a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(B) Subject to paragraphs (2) and (3) of this subsection, a veteran who the Administrator finds was exposed while serving on active duty to ionizing radiation from the detonation of a nuclear device in connection with such veteran's participation in the test of such a device or with the American occupation of Hiroshima and Nagasaki, Japan, during the period beginning on September 11, 1945, and ending on July 1, 1946, is eligible for hospital care and nursing home care under subsection (a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(2) Hospital and nursing home care may not be provided under subsection (a)(1)(G) of this section with respect to a disability that is found, in accordance with guidelines issued by the Chief Medical Director, to have resulted from a cause other than an exposure described in subparagraph (A) or (B) of paragraph (1) of this subsection.

(3) Hospital and nursing home care and medical services may not be provided under or by virtue of subsection (a)(1)(G) of this section after December 31, 1990.

(f)(1) The Administrator may not furnish hospital care or nursing home care under this section to a veteran who is eligible for such care by reason of subsection (a)(2)(B) of this section unless the veteran agrees to pay to the United States the applicable amount determined under paragraph (2) of this subsection.

(2) A veteran who is furnished hospital care or nursing home care under this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such care shall be liable to the United States for an amount equal to the lesser of—

(A) the cost of furnishing such care, as determined by the Administrator; and

(B) the amount determined under paragraph (3) of this subsection.

(3)(A) In the case of hospital care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is—

(i) the amount of the inpatient Medicare deductible, plus

(ii) one-half of such amount for each 90 days of care (or fraction thereof) after the first 90 days of such care during such 365-day period.

(B) In the case of nursing home care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is the amount of the inpatient Medicare deductible for each 90 days of such care (or fraction thereof) during such 365-day period.

(C)(i) Except as provided in clause (ii) of this subparagraph, in the case of a veteran who is admitted for nursing home care under this section after being furnished, during the preceding 365-day period, hospital care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of hospital care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such nursing home care until—

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(ii) In the case of a veteran who is admitted for nursing home care under this section after being furnished, during any 365-day period, hos-

pital care for which the veteran has paid an amount under subparagraph (A)(ii) of this paragraph and who has not been furnished 90 days of hospital care in connection with such payment, the amount of the liability of the veteran under paragraph (2) of this subsection with respect to the number of days of such nursing home care which, when added to the number of days of such hospital care, is 90 or less, is the difference between the inpatient Medicare deductible and the amount paid under such subparagraph until—

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(D) In the case of a veteran who is admitted for hospital care under this section after having been furnished, during the preceding 365-day period, nursing home care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of nursing home care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such hospital care until—

(i) the veteran has been furnished, beginning with the first day of such nursing

home care furnished in connection with such payment, a total of 90 days of nursing home care and hospital care; or

(ii) the end of the 365-day period applicable to the nursing home care for which payment was made,

whichever occurs first.

(E) A veteran may not be required to make a payment under this subsection for hospital care or nursing home care furnished under this section during any 90-day period in which the veteran is furnished medical services under section 612(f) of this title to the extent that such payment would cause the total amount paid by the veteran under this subsection for hospital care and nursing home care furnished during that period and under section 612(f)(4) of this title for medical services furnished during that period to exceed the amount of the inpatient Medicare deductible in effect on the first day of such period.

(F) A veteran may not be required to make a payment under this subsection or section 612(f) of this title for any days of care in excess of 360 days of care during any 365-calendar-day period.

(4) Amounts collected or received on behalf of the United States under this subsection shall be deposited in the Treasury as miscellaneous receipts.

(5) For the purposes of this subsection, the term "inpatient Medicare deductible" means the amount of the inpatient hospital deductible in effect under section 1813(b) of the Social Security Act (42 U.S.C. 1395e(b)) on the first day

of the 365-day period applicable under paragraph (3) of this subsection.

(g) Nothing in this section requires the Administrator to furnish care to a veteran to whom another agency of Federal, State, or local government has a duty under law to provide care in an institution of such government.

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